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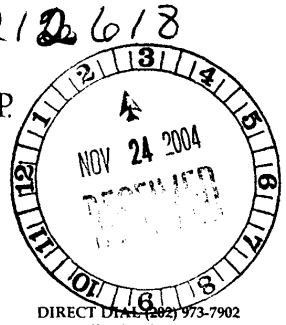

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November 24, 2004

BY HAND DELIVERY

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: CSX Corp. *et al.* – Control and Operating Leases/Agreements – Conrail Inc. *et al.*, Finance Docket No. 33388 (Sub-No. 91) (General Oversight)

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of CSX/NS-8, the "Joint Reply of CSX Corporation and CSX Transportation, Inc. and Norfolk Southern Corporation and Norfolk Southern Railway Company In Opposition To Petition For Reconsideration Of Decision No. 17."

Please date-stamp the enclosed additional 3 copies of CSX/NS-8 and return them to our messenger.

Sincerely,

Richard A. Allen

Enclosures

cc: John M. Whitlock, Esq.

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CSX/NS-8

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 33388 (Sub-No. 91)

CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
-- CONTROL AND OPERATING LEASES/AGREEMENTS --
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

(GENERAL OVERSIGHT)

JOINT REPLY OF CSX CORPORATION AND CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY IN OPPOSITION TO PETITION FOR RECONSIDERATION OF DECISION NO. 17

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Before The
Surface Transportation Board

Finance Docket No. 33388 (Sub-No. 91)

CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS —
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

(GENERAL OVERSIGHT)

JOINT REPLY OF
CSX CORPORATION AND CSX TRANSPORTATION, INC. AND
NORFOLK SOUTHERN CORPORATION AND
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IN OPPOSITION TO PETITION FOR RECONSIDERATION OF DECISION NO. 17

CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS" or "Norfolk Southern") submit this reply in opposition to the Petition For Reconsideration of STB Decision No. 17 filed on November 9, 2004 by the Commonwealth of Pennsylvania Department of Community and Economic Development ("Pennsylvania").

Introduction and Summary

In Decision No. 17 in this proceeding, served October 20, 2004, the Board concluded the five-year General Oversight proceeding. The Board had initiated General Oversight in 1998 when it issued Decision No. 89 in Finance Docket No. 33388, which approved, with conditions, acquisition of control of Conrail Inc. and Consolidated Rail

Corporation (collectively, "Conrail") by Norfolk Southern and CSX and the division of the operation of a portion of the assets of Conrail by and between Norfolk Southern and CSX (the "Transaction").[1] In Decision No. 89, the Board established the oversight proceeding "so that we may assess the progress of implementation of the CSX/NS/Conrail transaction and the workings of the various conditions we have imposed . . . ." 3 S.T.B. at 365. The Board also stated: "Our oversight will also encompass ensuring applicants' adherence to the various representations that they have made on the record during the course of this proceeding." *Id.* at 366.

In Decision No. 17, the Board generally concluded that "the conditions imposed are working as intended and that the transaction has not resulted in competitive or market power problems." Decision No. 17 at 10. The Board also considered claims by a number of parties, including Pennsylvania, that Norfolk Southern and CSX had not complied with various conditions, but it found the claims unsupported. It therefore denied all requests for relief and concluded that extension of the oversight proceeding was unwarranted. *Id.*

In its Petition for Reconsideration, Pennsylvania does not ask the Board to reconsider whether Norfolk Southern and CSX had failed to comply with the terms of two letters dated October 21, 1997 (hereafter, the "Pennsylvania Letters"), and thus with the representations condition imposed by the Board in Decision No. 89. Instead, the Petition for Reconsideration requests "clarification" that the Board's discussion of Pennsylvania's claims "did not intent to reach a decision on the merits on the effect of the [Pennsylvania Letters]. . . ." Petition at 3.

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[1] *CSX Corp. et al.—Control and Operating Leases/Agreements—Conrail Inc., et al.*, 3 S.T.B. 196 (1998) ("Decision No. 89"). References in this Joint Reply to other numbered decisions refer to decisions in the oversight proceeding, Finance Docket No. 33388 (Sub-No. 91), unless otherwise indicated.

No clarification of Decision No. 17 is needed or appropriate, and the Petition for Reconsideration should be denied. The Board rendered a decision on precisely the issues that Pennsylvania asked the Board to decide – whether or not Norfolk Southern and CSX had fulfilled their commitments in the Pennsylvania Letters and thus had complied with the representation condition. There is nothing unclear about what the Board decided. Furthermore, as will be discussed below, there is no merit to Pennsylvania's arguments (1) that it was not given adequate notice that the Board would decide what Pennsylvania asked it to decide or (2) that the Board lacks jurisdiction to make that decision. Whether or not Norfolk Southern and CSX have complied with conditions imposed by the Board as part of its approval of the Conrail Transaction is unquestionably within the Board's jurisdiction.

ARGUMENT

I. NO CLARIFICATION OF DECISION NO. 17 IS NEEDED.

The Board's rules permit a discretionary appeal of an entire Board action, requiring it to be styled a "petition for reconsideration," but they provide that such a petition "will be granted only upon a showing of one or more of the following points: (1)The prior action will be affected materially because of new evidence or changed circumstances. (2) The prior action involves material error." 49 C.F.R. § 1115.3(b). Pennsylvania's Petition for Reconsideration addresses neither point, but merely asks the Board to clarify that Decision No. 17 is not "a decision on the merits of as to whether the Railroads have complied with their obligations under the [Pennsylvania Letters]." Petition at 3.

No clarification of Decision No. 17 is needed. That decision responded directly to Pennsylvania's claim that NS and CSX had not complied with the Pennsylvania Letters. Pennsylvania presented this claim in eight separate written filings and oral statements:

1. Written comments on behalf of the Commonwealth of Pennsylvania, City of Philadelphia and Philadelphia Industrial Development Corporation ("PIDC"), dated April 2, 2004;

2. Oral testimony of Edward Duffy, Vice President of PIDC at the April 2, 2004 hearing at Trenton (Trenton Tr. At 76-81);

3. Letter from PIDC, dated April 13, 2004;

4. Written comments of the Commonwealth of Pennsylvania Department of Community and Economic Development ("DCED"), dated May 3, 2004;

5. Oral testimony of John M. Whitlock, Deputy Chief Counsel of DCED at the May 3, 2004 hearing in Washington, D.C. (D.C. Tr. at __);

6. "Supplemental Submission" by DCED, dated May 20, 2004;

7. Letter from John M. Whitlock, dated July 1, 2004; and

8. Letter from John M. Whitlock dated August 26, 2004.

In its May 3, 2004 written comments, Pennsylvania stated: "Our comments will be limited to one issue: the failure by both Norfolk Southern and CSX . . . to comply fully with their representations set forth in [the Pennsylvania Letters]." PA Comments at 1. Pennsylvania further asserted that this alleged failure contravened the condition imposed by the Board in Decision No. 89 that Norfolk Southern and CSX "adhere to all the representations they made during the course of the proceedings . . . ." *Id.* at 2.

Pennsylvania identified in detail the respects in which it contended that Norfolk Southern and CSX were not in compliance. [2]

Although Pennsylvania asked the Board to continue the formal oversight proceeding, it did so on the *basis* of the carriers' alleged failure to comply with the Pennsylvania Letters, and therefore the representation condition, and it thus squarely put the issue of compliance before the Board to resolve. The Board did resolve the issue, by addressing Pennsylvania's claims in detail and finding them unfounded. Decision No. 17 at 17-19. Pennsylvania's Petition for Reconsideration does not identify any part of the Board's discussion that it claims is unclear, and it does not attempt to show that any of it is wrong.

The Board, for example, very clearly rejected Pennsylvania's claim that the carriers had contravened the representation condition by failing to make specified levels of investment. The Board stated: "We do not regard the [Pennsylvania Letters] as imposing unqualified funding requirements on the carriers for projects designated by others. Other conditions set forth in the letters – such as contractual obligations of levels of traffic – must be met. As DCED and PDIC [the Philadelphia Industrial Development Corporation] have not even attempted to show that the contractual obligations for levels of rail business and all of the other preconditions to funding were met, they have not demonstrated non-compliance with the carriers' commitments." Decision No. 17 at 18.

In short, Pennsylvania may not like the *outcome* of the Board's consideration of the issues Pennsylvania presented to it, but there is nothing unclear about what the Board decided.

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[2] The testimony of DCED Deputy Chief Counsel Whitlock on behalf of Pennsylvania at the May 3, 2004 hearing at the Board was to the same effect.

II. PENNSYLVANIA WAS NOT DENIED ADEQUATE NOTICE.

Nor is there any basis for Pennsylvania's claim that it was not adequately notified that that Board would decide the issue of the carriers' compliance with the Pennsylvania Letters. Indeed, the claim is quite surprising. When a party makes an assertion that is disputed by other parties and asks the Board to take certain action *based* on that assertion, it can hardly claim surprise or lack of notice when the Board then decides whether the assertion is true or not.

As noted, Pennsylvania itself placed the issue of the carriers' compliance with the Pennsylvania Letters squarely before the Board to resolve in its eight separate written filings and oral statements. Pennsylvania was also fully on notice that NS and CSX disputed its claim of non-compliance, which they did in detail in their Joint Reply (CSX/NS-6), filed August 2, 2004, at 40-63. In fact, DCED filed a surreply to the carriers' Joint Reply on August 26, 2004. *See, e.g. Savina Home Industries, Inc. v, Secretary of Labor,* 594 F.2d 1358, 1365 (10th Cir. 1979) ("As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled, the notice is sufficient.")

Significantly, Pennsylvania does not contend that it failed to make any additional arguments or adduce any additional evidence in support of its noncompliance claim because of its belief that the Board would not decide the issue of non-compliance. Given its filings and testimony, including its surreply to the carriers' Joint Reply, it could make no such claim. *See, e.g., John D. Copanos & Sons v. FDA*, 854 F.2d 510, 520 (D.C. Cir. 1988) (rejecting a claim of insufficient notice by a party who failed to show what evidence and arguments it might have made with different notice).

The Board's decisions also demonstrate Pennsylvania had ample notice that the Board could, and probably would, decide whether Norfolk Southern and CSX were in compliance with the various conditions imposed. Nothing in any of the Board's decisions in this case stated or implied that the Board's oversight decisions would not decide claims that the carriers were not in compliance with conditions or that its decision in the final round of oversight would be limited to the issue whether formal oversight should be extended. On the contrary, beginning with Decision No. 89, the Board made clear that it would, in the oversight proceedings, consider and decide claims regarding compliance with conditions, and a number of its decisions during the oversight period decided such claims.

Thus, as noted, in Decision No. 89, the Board specifically stated that it was instituting the oversight "to assess the progress of implementation of the CSX/NS/Conrail transaction and the workings of the various conditions we have imposed . . . ." and that "[o]ur oversight will also encompass ensuring applicants' adherence to the various representations that they have made on the record during the course of this proceeding." 3 S.T.B. at 365-366. The Board reiterated these statements in its decisions at the conclusion of each annual round of oversight, including Decision No. 11, served January 21, 2004, establishing the schedule for the submission of written comments in the final oversight round, and Decision No. 12, served February 12, 2004, giving notice of the scheduling of the hearings in Trenton, New Jersey and Washington, D.C. In Decision No. 5, for example, at the end of the first year of oversight, the Board stated that "the purpose of this proceeding is to determine whether the conditions we imposed in our decision approving the transaction *are being complied with* and are serving their intended

purpose of addressing harms that otherwise would have resulted from the Conrail Transaction." Decision No. 5, slip op. at 12 (served February 2, 2001) (emphasis supplied).

The Board has also made such determinations on a number of occasions during the oversight period. In Decision No. 5, for example, it considered and rejected claims that "the railroads have failed to comply with the terms of existing Negotiated Agreements or to implement our environmental conditions. . . ." Decision No. 5 at 28-29. In a decision served the same day in Docket No. 33388 (Sub-No. 93) concerning Buffalo Area Infrastructure, the Board rejected a claim by the Erie-Niagara Rail Steering Committee the NS had violated the representation condition by failing to build two track connections in Buffalo, NY that had been listed in Norfolk Southern's operating plan.

In support of its claim that the Board's decision on Pennsylvania's claim of noncompliance with the Pennsylvania letters was made without adequate notice, Pennsylvania cites *Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. ICC*, 585 F.2d 254 (7th Cir. 1978). While that case endorses the general proposition that agencies must provide parties adequate notice of the issues the agency may decide, it provides no support for Pennsylvania's claim in this case. In the *Chicago, Milwaukee* case, the ICC affirmatively indicated that, in connection with a certain oral argument, it would *not* consider the merits of an inclusion application, but only certain jurisdictional, discovery and other "preliminary" legal issues. *Chicago, Milwaukee,* 585 F.2d at 261-262. In those circumstances, the court held that the issuance of a subsequent decision on the merits of the application deprived the applicants of adequate notice.

In this case, in contrast, the Board's prior decisions gave ample notice that it could and probably would decide the merits of claims that its conditions had not been complied with, and nothing in those decisions suggested that such claims would not be considered.

In sum, there is no basis for Pennsylvania's suggestion that the Board's decision on the claim Pennsylvania presented deprived it of adequate notice.

III. THE BOARD HAD JURSIDICTION TO DECIDE PENNSYLVANIA'S CLAIM THAT NORFOLK SOUTHERN AND CSX WERE NOT IN COMPLIANCE WITH A BOARD-IMPOSED CONDITION.

Equally groundless is Pennsylvania's suggestion that the Board's decision was beyond its jurisdiction because the decision involved "issues of contract enforcement" that can only be resolved by a court. Petition at 7. Indeed, the suggestion is patently inconsistent with Pennsylvania's own arguments to the Board in this round of oversight, which were that the Pennsylvania Letters were representations by the carriers in the course of the proceedings and that the carriers' alleged noncompliance with the Pennsylvania Letters contravened the representation condition imposed by the *Board* in Decision No. 89, and which asked the Board to extend the formal oversight proceeding to ensure that the *Board* could enforce that condition.[3] Had the Board concluded that NS

[3] That Pennsylvania considered the carriers' letters not as private contracts but as Transaction-dependent obligations enforceable by the STB under the Board's "representation" condition was clear as early as 1998, when Pennsylvania submitted the letters to the Board under a cover letter stating that although the letters "do not require the imposition of any conditions by the Board," the obligations in the letters "depend upon Board approval of the proposed transaction" and "may be considered by the Board as constituting representations that the Applicant will comply with their respective terms." PA-10 in Finance Docket No. 33388 (dated February 23, 1998). Additionally, the Pennsylvania letters were among the agreements identified by Norfolk Southern and CSX as ones with which the Board could choose to require compliance under a representation condition. *See* letter from Dennis G. Lyons to STB Secretary Vernon A. Williams dated

and/or CSX had not complied with any of their commitments, and thus violated one of the Board's conditions, NS and/or CSX would have considered themselves bound by that conclusion, and no doubt Pennsylvania would have enlisted the Board's power in enforcing those commitments. Pennsylvania's rejection of the Board's jurisdiction at this late date appears to be based solely on the fact that its arguments did not prevail.

In any event, there can be no serious doubt that the Board has jurisdiction to enforce conditions it has imposed in approving a transaction under 49 U.S.C. § 11323, and therefore necessarily to determine whether there has been a violation of those conditions. Indeed, courts have repeatedly held that the Board has primary jurisdiction to determine whether conditions imposed in a railroad consolidation have been violated, including conditions that are embodied in agreements between the applicants and other parties, and to determine what remedial actions to require. *See, e.g., Union R. Co. v. United Steelworkers of America,* 242 F.3d 458, 464-466 (3d Cir. 2001); *Landis v. Burlington Northern R. Co.*, 930 F.2d 748, 751-752 (9th Cir. 1991); *Rilling v. Burlington Northern R. Co*, 909 F.2d 399, 400-401 (9th Cir. 1990); *Engelhardt v. Consolidated Rail Corp.*, 756 F.2d 617 (2d Cir. 1985).

That is so because those determinations often implicate important questions of transportation policy that require a uniform resolution. *Union R. Co.,* 242 F. 3d at 465. It could hardly be maintained, for example, that the Board could find that a carrier had not violated a Board-imposed condition (for example, by failing to build a particular interlocking that changed circumstances had rendered redundant or unnecessary) but that a court in a collateral action could subsequently rule to the contrary, or vice versa. The

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June 6, 1998 in Finance Docket No. 33388 (discussion of agreements listed under Attachment 3).

Board's determinations on such questions, of course, are subject to direct judicial review, but the courts uniformly accord a "high degree of deference" to the Board's determinations regarding its own conditions. *Landis v. Burlington Northern R. Co.*, 930 F.2d at 753 (quoting *Lambert v. FDIC*, 847 F.2d 604, 606 (9th Cir. 1988)).

Pennsylvania cites *Morristown & Erie Railway, Inc. – Modified Rail Certificate*, Finance Docket No. 34054 (served June 22, 2004) for the proposition that private contract disputes are for the courts to decide, but again, that case provides no support for its position here. That case did not involve conditions imposed in a rail consolidation, and the agreement at issue had no relation to any such conditions. The Board's observation in *Morristown & Erie* that it is not the proper forum to resolve private contract disputes has no relevance to this case, in which the Board addressed and decided Pennsylvania's claim that Norfolk Southern and CSX had failed to comply with a Board-imposed condition in the Conrail Transaction.

CONCLUSION

Pennsylvania's petition for reconsideration of Decision No. 17 should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 24, 2004, a true copy of CSX/NS-8 was served by first class U.S. Mail, postage prepaid upon:

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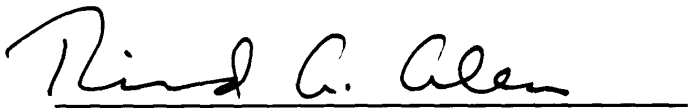

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